

REQUEST FOR RECONSIDERATION OF FEDERAL SUBSISTENCE BOARD DETERMINATIONS ON PROPOSAL FRFR 06-02/03/08, including the Board's Determination that the Community of Ninilchik Has Customarily and Traditionally Harvested for Subsistence Purposes All Fish Located Within the Boundaries of the Kenai National Wildlife Refuge And Chugach National Forest, including the Upper Kenai River, Russian River, Swanson River, and their Lakes and Drainages

By State of Alaska

I. Introduction

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G), respectfully requests that the Federal Subsistence Board (Board) reconsider and rescind its decision of November 17, 2006 upon Proposal FRFR 06-02/03/08, providing "to the community of Ninilchik a customary and traditional use determination for all fish in the waters north of and including the Kenai River drainage, within the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai Peninsula district." See Transcript of Federal Subsistence Board November 16-17, 2006 Work Session (hereinafter "11/16-17/06 Tr."), at p. 169.¹

Reconsideration is required because, in adopting that final rule, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR §242.20(d); 50 CFR §100.20(d). In addition, reconsideration is required because, in making its determination, the Board assumed incorrect information, including unsupported speculation regarding fish stocks, resulting in a determination based on speculation. The Board must instead consider real, factual information not previously considered by the Board, of the type on which this request is partly based. *Id.*

The Board's aforementioned finding that the residents of Ninilchik have customarily and traditionally used the numerous fish stocks in the area affected, and thus may have a preferential right to harvest those fish by preferential means, is inconsistent with applicable law including the Board's regulations in 36 CFR §242.16 and 50 CFR §100.16, will create a preference for uses that are not within the definition of "subsistence uses" in Section 803 of the Alaska National Interest Lands Conservation Act (ANILCA), does not properly balance or further the competing purposes of ANILCA recognized by the Court in *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000), and will cause unnecessary restriction of non-subsistence uses in violation of

¹ As set out later in this Request for Reconsideration, the State also requests that the Board reconsider its failure to definitively decide ADF&G's previous requests for reconsideration dated May 5, 2006, of the Board's prior customary and traditional use determinations for Ninilchik as to the Kasilof River drainage fishery and for Cooper Landing and Hope as to the "Kenai River Area" drainage fisheries.

Section 815 of ANILCA. More detailed reasons for this Request for Reconsideration (RFR) include the following:

- The Board made its customary and traditional use determination without substantial supporting evidence and without a reasonable examination of the eight regulatory factors for making customary and traditional use determinations with regard to the various fish stocks and areas covered by the determination.
- The Board incorrectly determined that fishing for all fish in the affected, widespread area far removed from the community of Ninilchik is a customary and traditional subsistence use of that community without adequate supporting information for that determination on the record, thus rendering the determination arbitrary and capricious.
- The evidence presented to the Board did not demonstrate a long-term consistent, recurring pattern of subsistence use by the community of Ninilchik of the affected fish in the distant, expansive location of the determination.
- The evidence presented to the Board did not demonstrate that the salmon, rainbow trout, char, and other fish stocks in that distant, widespread area are the same fish stocks as those present in areas much closer to and historically and much more frequently used by Ninilchik, such as the Ninilchik River and Deep Creek.
- The Board unreasonably declined to defer consideration of the proposal which it determined pending compliance with directions from the Secretary of the Interior requiring the Board to develop written procedures and policies for rendering customary and traditional use determinations.
- The Board violated its own regulatory procedures and Secretarial direction by improperly and unreasonably denying the Alaska Department of Fish and Game Board Liaison the ability to provide and discuss relevant information during the critical point of Board deliberations resulting in the challenged determination.
- The Board lacked necessary jurisdiction to make the traditional and customary use determination because the Federal Government has not legally and properly established reserved water rights in the waters covered by its determination, as required by law.

This RFR is being submitted at this time because the State has been informed by the Regulation Specialist for the federal Office of Subsistence Management (OSM) that in his opinion the action which is the subject of this RFR went into effect immediately.²

² Personal communication between Sarah Gilbertson and Bill Knauer on November 28, 2006.

Although nothing to that effect, nor the regulatory action itself, has been published in the Federal Register or elsewhere to the State's knowledge, and although the Board did not provide for immediate effectiveness of its action on the record, nevertheless the State is submitting this RFR at this time, in an abundance of caution. The State does not agree that the Board actions which are the subject of this RFR can be effective immediately without proper process and notice by publication. The State reserves the right to supplement this RFR.

Neither does the State, by requesting reconsideration at this time, waive any of its rights to pursue other legal remedies available to it under applicable law, including court action. It is also the State's position that, under the circumstances presented, it does not have to make this request for reconsideration in order to exhaust administrative remedies. However, this RFR provides the Board with a reasonable opportunity, within a reasonable time frame well before the upcoming fishing season, to address the State's grievances, and thereby possibly resolve the issues and eliminate need of the State's pursuit of relief in another forum.

Because the Board did not properly consider the proposals at issue in accordance with the requirements of ANILCA and the Board's own regulations, and because the Board based its decisions on factual errors and failed to allow or otherwise consider important, necessary information, the Board's determinations upon which reconsideration is hereby being requested are unsubstantiated, arbitrary and capricious.

As provided by 36 CFR §242.20(d)(4) and 50 CFR §100.20(d)(4), a more detailed statement follows.

II. Regulations Challenged and Information Presented, and Not Presented, to the Board

At its meeting on November 17, 2006, the Board adopted a proposal which it, the Staff of the OSM, and the federal Interagency Staff Committee (ISC) curiously identified as FRFR 06-02/03/08, "reconsidering" the Board's prior action in January 2006 on Fisheries Proposal FP06-09 and amending the sections of 36 CFR §242.24 and 50 CFR §100.24 dealing with Cook Inlet customary and traditional use determinations.³ The Board's November 17, 2006 action added a positive customary and traditional (C&T) use determination to those regulations for all residents of the community of Ninilchik for all fish in all waters within the Board's Kenai Peninsula District north of and including the

³ In fact, as is clarified in the discussion which follows, FRFR06-02 and FRFR06-03 were two requests brought by ADF&G in May 2006 concerning different matters, which the State contends the Board never directly or adequately addressed, whereas FRFR06-08 was the request for a new C&T determination for Ninilchik brought separately by the Ninilchik Traditional Council (NTC), which the Board did address.

Kenai River, Russian River, and Swanson River drainages lying within (and also possibly adjacent to) the Kenai National Wildlife Refuge and the Chugach National Forest.⁴ The Board's action added a significant regulation and constituted a new action.

The vast area encompassed by that new C&T determination is depicted by the two shaded areas and boundary lines of FRFR06-02/03/06 Map 1 Upper Kenai Peninsula, attached hereto as Attachment 1 and contained at page 4 of the October 31, 2006 Staff Analysis referenced at footnote 4 below. That area is also shown within Map 11 Cook Inlet Area from page 50 of the 2006-2007 Federal Subsistence Fisheries Regulations, attached as Attachment 2. As shown by those maps, the Board's action translates into a determination that the community of Ninilchik, which is located many miles away on the lower Kenai Peninsula, has customarily and traditionally used all fisheries located within (and/or adjacent to) the exterior boundaries of the Kenai National Wildlife Refuge and Chugach National Forest, including the aforementioned rivers and their lakes and drainages and extending up through the northern, uppermost reaches of the Kenai Peninsula District including Resurrection Creek near Hope and the Lower and Upper Summit Lakes.⁵

The Board's action of November 17, 2006 added the residents of the community of Ninilchik to the communities of Cooper Landing and Hope, to which the Board had previously granted a C&T priority use determination as to all fish in the same "Kenai River Area" waters during its meetings held in January 2006.⁶ At those meetings in January 2006, the Board, in further response to FP06-09, granted a C&T determination to the residents of the community of Ninilchik to all fish in all waters within the Kasilof River drainage within the Kenai National Wildlife Refuge, but deferred any decision upon a C&T determination for Ninilchik as to the above-described "Kenai River Area" waters.⁷

The State of Alaska (State) formally requested reconsideration of the Board's determinations for Ninilchik of C&T use of the Kasilof River drainage and for Cooper Landing and Hope of C&T use of the aforesaid "Kenai River Area".⁸ The Ninilchik

⁴ 11/16-17/06 Tr. pp. 78, 159-169; OSM Staff Analysis FRFR06-02/03/08 dated Oct. 31, 2006, at pp. 1-4 (hereinafter "Staff Analysis"); ISC Recommendation upon FRFR06-02/03/08 (two pages).

⁵ *Id.*

⁶ *Id.* See also Transcript of Federal Subsistence Board's January 10-13, 2006 Public Regulatory Meetings (hereinafter "1/10-13/06 Tr.", at Tr. pp. 499-500, 525-526.

⁷ *Id.*

⁸ See ADF&G's Request for Reconsideration dated May 5, 2006 of that portion of the Board's decision upon FP06-09 establishing a C&T determination for Ninilchik in the Kasilof River drainage, denoted FRFR06-02 by the Board, and ADF&G's Request for Reconsideration dated May 5, 2006 of that portion of the Board's decision upon FP06-09

Traditional Council (NTC) separately requested reconsideration of the Board's "denial" of a C&T determination for Ninilchik use of all fish within the "Kenai River Area".⁹

Later, at NTC's request, the Board chose not to revisit the issue of a C&T determination for Ninilchik of the "Kenai River Area" as a normal regulatory proposal during its next regular cycle of Public Regulatory Meetings¹⁰ in the manner consistent with the Board's established procedure and previous treatment of the subject in January 2006. Instead, the Board accepted NTC's May 30, 2006, Request for Reconsideration on August 31, 2006, in a closed Executive Session not open to the public. The Board then decided NTC's reconsideration proposal (granting the C&T determination) in a specially scheduled Board Work Session on November 17, 2006.¹¹

At the same time, and in the same manner, that the Board took action on NTC's Request for Reconsideration outside of the public eye, the Board took action as to the State's Requests for Reconsideration of the Board's previous C&T determinations for Ninilchik as to the Kasilof River drainage and for Cooper Landing and Hope, although what action the Board took upon those State requests is unclear.¹² The Board stated that in response to the State's two requests it was accepting reconsideration of additional State analysis of information gathered from ADF&G's study, *Cook Inlet Customary and Traditional Subsistence Fisheries Assessment* (Fall et al, 2004), because, in the words of the Board, it "contributes to a more thorough understanding of the customary and traditional use of the Federal waters of the Kenai Peninsula."¹³ The State reasonably understood that the Board, by accepting reconsideration in connection with FRFR 06-02 and FRFR 06-03, was accepting reconsideration of the correctness of the Board's January 2006 C&T determinations for Ninilchik as to the Kasilof River drainage and Cooper Landing and Hope as to the Kenai River drainage, as that was the obvious purpose of

establishing a C&T determination for Hope and Cooper Landing in the Kenai River drainage and waters north of that drainage, denoted FRFR06-03 by the Board.

⁹ See NTC's Request for Reconsideration dated May 30, 2006 of that portion of the Board's decision upon FP06-09 "effectively denying" a C&T determination for Ninilchik in the Kenai River drainage and waters north of that drainage, denoted FRFR06-08 by the Board.

¹⁰ That precise proposal, Proposal FP 07-27A, was already scheduled for regular consideration by the Board in 2007 before the summer fishing season.

¹¹ See, e.g., Board's Sept. 14, 2006 correspondence to NTC legal counsel on Board-designated FRFR 06-08 & references previously cited at footnote 4.

¹² See, e.g., Board's Sept. 14, 2006 correspondence to ADF&G Commissioner Campbell identified as "FWS/FSB/OSM/FRFR06-0203" and regarding federally-denoted FRFR 06-02 and FRFR 06-03, described in footnote 8 above, & the references cited at footnote 4 previously.

¹³ See Board's Sept. 14, 2006 Correspondence to ADF&G described in footnote 12 immediately above, at pp. 1-2, 5.

those two Requests addressing “the Kenai Peninsula”.¹⁴ However, federal OSM staff took the position, *after* the Board’s September 14, 2006 correspondence, that reconsideration of this additional State analysis and information had been accepted by the Board only in relation to consideration of NTC’s request for reconsideration.¹⁵ The Board did not at all address FRFR 06-02 or FRFR 06-03, including those unresolved differences of opinion between the State and OSM staff, at its November 16-17, 2006 proceedings, despite the State’s continuing objections in that regard.¹⁶ As part of this RFR, the State requests that the Board finally address FRFRs 06-02 and 06-03 on the merits.

The State of Alaska also objected throughout those proceedings on several other procedural and substantive grounds.¹⁷ Among other points, ADF&G objected for the reasons specified in former Commissioner Campbell’s October 26, 2006 correspondence to Board Chairman Fleagle, including its two attachments; namely, Attachment 1, ADF&G Page-by-Page Detailed Comments on [OSM] Draft Staff Analysis FRFR06-02/03/08 dated October 20, 2006, and Attachment 2, ADF&G Specific Comments on Dr. Wolfe’s Papers. Both of those attachments and Commissioner Campbell’s letter were

¹⁴ See, e.g., the State’s May 5, 2006 Requests for Reconsideration & Correspondence dated October 26, 2006, including two attachments, from former ADF&G Commissioner Campbell to Board Chairman Fleagle, continuing to specify how those prior C&T determinations are not supported by substantial evidence and should be reconsidered.

¹⁵ See, e.g., OSM Staff Analysis FRFR 02/03/08 dated October 20, 2006 (and again on October 31, 2006), opining that the prior Board determinations on which the State sought reconsideration should not be reconsidered, & Commissioner Campbell’s Oct. 26, 2006 Correspondence to Chairman Fleagle, including two attachments, responding to that OSM analysis and expressing the State’s view that OSM Staff had misconstrued the State’s information and the basis of FRFR 06-02 and FRFR 06-03. See also OSM’s response dated November 13, 2006 to “State of Alaska Comments – October 26, 2006 Regarding FRFR06-02/03/08 Analysis Office of Subsistence Management”, opining at p. 2: “Therefore, there is no information for the Board to consider and no changes to the C&T for the Kasilof River drainage made in January 2006” and “The Board never said it would reconsider Hope and Cooper Landing C&T in their earlier letter responding to the RFR or in the threshold analysis. There is no new information provided that would warrant revisiting Hope and Cooper Landing’s C&T determinations.” Yet OSM Staff continued to address the substance of the State’s two RFRs at the Board’s proceedings of November 16-17, thus revealing OSM’s own uncertainty in the matter. See, e.g., 11/16-17/06 Tr. pp. 80-82.

¹⁶ See, e.g., 11/16-17/06 Tr. pp. 121-122, 125; ADF&G Commissioner Campbell’s October 26, 2006 Correspondence to Board Chairman Fleagle, at pp. 1-3 & including Attachments 1 and 2 to that correspondence.

¹⁷ See, e.g., 11/16-17/06 Tr. pp. 121-127, 161-162.

incorporated into the record of the Board's November 16-17, 2006, proceedings through the comments of the State of Alaska representative.¹⁸

In that October 26, 2006, correspondence and also at the Board proceedings, the State expressed its deep concern "that the Federal Subsistence Board is circumventing its normal public process in an effort to hastily grant the community of Ninilchik customary and traditional use of the Kenai River drainage based upon a faulty interpretation of Department [ADF&G] data" and Dr. Wolfe's unpublished papers regarding Ninilchik household and tribal use surveys. The State explained its concerns, including OSM staff's inaccuracies, mischaracterizations, and misanalysis of data being relied on by the Board and the lack of public notice and meaningful opportunity for the State and public to be timely heard.¹⁹

In addition, the State objected to the Board making determinations without the benefit of developed written procedures and policies for making C&T use determinations, as directed by the Secretary of the Interior on October 27, 2005, and the State stated its reasons for those objections.²⁰

It was also shown that the evidence is insufficient – in terms of frequency of use, area of use, community use, lifetime use, or otherwise -- to support a determination that there has been a long-term consistent, recurring pattern of customary and traditional use for subsistence by Ninilchik of the fisheries located within the Kenai National Wildlife Refuge or Chugach National Forest, as is required by ANILCA and the regulations governing such determinations.²¹ Among other reasons, it was pointed out that OSM's analysis misinterpreted and misused ADF&G survey findings; that the eight factors for determining C&T use under the Board's regulations were not met; that at most only 7% of Ninilchik households claimed annual use of the upper Kenai area fisheries at issue in even recent years, that only 13% (including the 7%) claimed frequent use (meaning almost every year) of that area for any of their fishing, that only 4% more claimed intermittent use, that only a total 28% of Ninilchik residents claimed any such use ever during their lifetimes, and that only 2-3% identified taking trout or any species of fish other than salmon from that area (and only 4% salmon); that Ninilchik residents had their highest use of the fisheries closest to Ninilchik (such as Ninilchik River and Deep Creek), used the lower Kenai River some, and used the upper Kenai River drainage areas "farther

¹⁸ 11/16-17/06 Tr. pp. 121-127, 161-162. The State also submitted written comments into the record entitled "ADF&G Page-by-Page Detailed Comments on [OSM] Staff Analysis FRFR06-02/03/08 dated October 31, 2006" after that subsequent OSM Analysis was issued. *Id.* At 121-122.

¹⁹ Campbell 10/26/06 Correspondence at 1-2; 11/16-17/06 Tr. at 122, 126.

²⁰ *See, e.g.*, Campbell 10/26/06 Correspondence at 2; 11/16-17/06 Tr. at 126-127.

²¹ *See, e.g.*, Campbell 10/26/06 Correspondence at 3-4 & attachments thereto; 11/16-17/06 Tr. pp. 122-134, 161-162.

from the community” least; that Ninilchik and the NTC had not harvested all the fish they could under generous state-issued educational fishery permits already existing on the Kenai Peninsula closer to their homes; that no harvest *amounts* for fish taken by residents of Ninilchik in the upper Kenai areas covered by the Board’s new C&T determination had been shown; that the sparse participation levels for Ninilchik residents of the upper Kenai River drainages demonstrated more of a *sportfishing* use (rather than traditional subsistence use), which was made easy by highway access, not unlike the use of that same area to harvest fish by residents of Anchorage and other urban areas; that there was little to no evidence of Ninilchik’s use of that distant Kenai area prior to construction of the highway linking Ninilchik (and much of the rest of Alaska) to that area; that heretofore subsistence fishing by traditional subsistence means such as netting had not been allowed within that area under federal or state law; and that subsistence is not even listed as one of the purposes of the Kenai National Wildlife Refuge (explicitly created instead to provide opportunities for fish and wildlife recreation, etc.).²² Even OSM’s cultural anthropologist, H. Armstrong, who characterized Dr. Fall’s surveys of Ninilchik households for ADF&G as “thorough”, scientific, and “of the entire community”, also acknowledged: “I mean there’s no – nobody here is saying that the Ninilchik people used the Kenai River to a great extent. I mean that’s a fact that it’s not a really heavily used area [by Ninilchik], they’re harvesting most of their resources close to the community.”²³

Furthermore, ADF&G was arbitrarily and capriciously denied the opportunity to be fully heard on those matters by being cut off during Board deliberations on the subject, upon the request of a Board member and upon incorrect advice of the Solicitor’s Office to the Board Chair, in violation of the Board’s own procedures and Secretarial direction.²⁴

Very soon after making that erroneous ruling prohibiting the State from participation, the Board then introduced speculation into its deliberations and improperly relied upon that speculation as an important part of making its positive C&T determination. It speculated that the salmon, trout, and other fish stocks in the distant, widespread drainages of the Kenai National Wildlife Refuge and Chugach National Forest under consideration, including the Kenai River, Russian River, Swanson River, Summit Lake, and Resurrection Creek drainages, are the “same stock” as the fish in the

²² *Id.*

²³ 11/16-17/06 Tr. at 87.

²⁴ See 11/16-17/06 Tr. 161-163 (improperly prohibiting the State of Alaska representative from participating during deliberations); Correspondence in 2004 from Secretary Norton directing otherwise, attached hereto as Attachment 3; Transcript of December 11-12, 2006, Board Meetings (acknowledgement by Board Chair of erroneous ruling on November 17, 2006 improperly preventing State from participation contrary to Secretarial intent).

areas much closer to and much more commonly used by Ninilchik, such as the Ninilchik River and Deep Creek.²⁵

However, *no* evidence, substantial or otherwise, had been presented that could support that speculation.²⁶ To the contrary, that topic did not arise until very late in the Board's deliberations, after all information had been submitted to the Board, none of which included factual information about specific fish stocks. The topic arose only in response to Board concerns that a C&T use for fishing by Ninilchik in the faraway Kenai River Area under consideration had not been shown. At that juncture, the Board's Solicitor countered: "We're trying to determine if there were customary and traditional uses of a *stock or population, that's all*. * * * And we're not – as far as I can tell, we're not tied to a location. It [where the use occurred or is created] could be on the Kenai River, it could be off, we're talking about the population and stock. There's a long, long stretch of fishable water where that stock or population could be harvested." 11/16-17/06 Tr. at 166 (emphasis added). Board Chairman Fleagle then immediately responded: "I'm glad you made that point. * * * And obviously this is going to be another one of those decisions where my vote is either going to allow this thing to pass or not [In my opinion] we are not looking at whether there is just a defined pattern of use for that portion of the river system that happens to be Federal, for the community of Ninilchik and Cooper Landing and Hope on the Kenai River To me it's pretty clear that *if you take that entire river system and even that entire area, if you include other river systems, other than the Kenai, you got the Kasilof, you got the Ninilchik, you got Deep Creek, you got several different systems that could be defined as the same fish stock*, I think it's overwhelmingly evident that you do have customary and traditional use, and that's where I have to fall." *Id.* at 166-167 (emphasis added). Immediately thereafter, the vote of the Board was taken and the motion to grant Ninilchik a C&T determination for the broad scope of the "Kenai River area" passed 5 to 1, with the last voter, Board member Oviatt, commenting: "I'm going to vote aye. And I was swayed by our Chairman" *Id.* at 168-169.

Indeed, it could be shown that the Board's speculation on that topic, which was decisive, is incorrect, but as noted the opportunity to do so was not given. If given the opportunity to address that topic the State could show that the salmon and other fish stocks, including trout and char, of the distant Kenai River drainages, streams and other water bodies affected by the Board's C&T determination, are not the same fish stocks as exist for the Ninilchik River, Deep Creek, Kasilof River or other streams and rivers within the Kenai Peninsula District. They are not one homogenous fish stock.²⁷ The

²⁵ 11/16-17/06 Tr. pp. 166-169.

²⁶ *Id.*, Tr. pp. 78-169.

²⁷ For example, the National Marine Fisheries Service Northeast Fisheries Science Center (http://www.nefsc.noaa.gov/techniques/tech_terms.html#sa2) gives the following definition: "**Stock:** A part of a fish population usually with a particular migration

State requests Board reconsideration in order to be given the opportunity to show that. Otherwise, the Board's determination will remain founded on unsupported speculation contrary to law.

In addition, the State challenged the Board's claim to jurisdiction to make that C&T use determination and other determinations at issue here and in the additional RFRs being filed by the State this month and previously, because the Federal Government has not legally and properly established water rights in the waters covered by those determinations, as set out and pending in *Katie John, Gerald Nicolia, et al., Plaintiffs, v. The United States of America, et al., Defendants*, United States District Court for the District of Alaska Case No. A05-0006-CV (HRH) (Consolidated), incorporated herein by reference.

The effect of the Board's regulatory C&T determination is to provide a federal preference to residents of Ninilchik for harvest of all fish, including all types of salmon, Dolly Varden, rainbow trout, char, lake trout, grayling, and burbot, in all waters of the Kenai Peninsula District north of and including the Kenai River, Russian River, Swanson River, and their lakes and drainages within and adjacent to the boundaries of the Kenai National Wildlife Refuge and Chugach National Forest, as more fully described above. Nonlisted rural residents, along with other state users, of these highly popular and heavily used water bodies will not be eligible to participate in these federal fisheries and will be limited to participation in state fisheries. This federal customary and traditional use determination can be expected to lead to an increased harvest of fish, such as salmon, eligible for limited harvest within the area under state regulations, and to the harvest of other fish, such as rainbow trout, not generally eligible for harvest under state regulations within the area.

pattern, specific spawning grounds, and subject to a distinct fishery." The Washington Department of Fisheries has defined fish stock as "The fish spawning in a particular lake or stream(s) at a particular season, which fish to a substantial degree do not interbreed with any group spawning in a different place, or in the same place at a different season." WDF 1993, "1992 Washington State Salmon and Steelhead Stock Inventory". Similarly, as early as 1939 in the American Association for the Advancement of Science, Publ. 8, p. 106, it was stated: "The salmon of a given species may in locality, *e.g.*, a river, constitute a more or less distinct entity, for which the name 'stock' is to be preferred." In other words, the term "fish stock" denotes a fish of a particular species which may be found in a specific stream during a particular season, or at most, the fish of a particular species which may be found within a specific drainage during a particular season. Further information on the subject, particularly as it relates to the different fish stocks indiscriminately grouped together in the Board's determinations, can be provided to the Board by ADF&G senior biologists, including John Hilsinger and Jeff Regnert.

In times of shortage, those users who qualify under this federal C&T determination may receive preferential treatment under federal law detrimental to the fish stocks through special actions or through failure to mirror State emergency orders. The new C&T determination may also lead to new restrictions on the great majority of users, who are nonrural. Liberalization of methods and means and increased harvest of fish on federal lands under this C&T determination may require adjustment of seasons and harvest restrictions under state law in order to ensure compliance with the sustained yield mandate of the Alaska Constitution.²⁸ Too little is known about fish species other than salmon in the waters covered by this broad C&T determination, and even the salmon runs in these waters have been unpredictable in recent years. State of Alaska recreational fishing regulations for these species, especially the trout and other resident species, are very conservative. Little or no stock assessment information exists for those species. Any conservation problems created by the new fishery harvests authorized under this new C&T determination would be difficult, if not impossible, to detect in a timely manner.

III. Further Discussion

A. The actions taken by the Board are inconsistent with the regulatory definition of customary and traditional use and with application of the regulatory criteria for finding customary and traditional use.

Reconsideration is required because, in adopting the customary and traditional use determination for Ninilchik in the Kenai River area,²⁹ the Board failed to follow the regulatory definition of customary and traditional use and the regulatory criteria for finding customary and traditional use. As a result, the Board made an unnecessary, incorrect, and overly broad customary and traditional use determination based on incorrect or improper considerations and insufficient evidence (including no evidence at

²⁸ Even nonconsumptive catch and release fisheries may have to be closed in order to reduce pressure on highly vulnerable stocks if consumptive subsistence fisheries are authorized.

²⁹ As previously noted, the State also seeks reconsideration of the Board's apparent failure to act on the State's two previous Requests for Reconsideration dated May 5, 2006 and designated FRFR 06-02 and FRFR 06-03. In support of that part of this RFR, the State relies on the content of those two previous RFRs, Commissioner Campbell's aforementioned correspondence to the Board dated October 26, 2006 including attachments, the State's comments on those subjects at the Board's November 16-17, 2006 Work Session, and the other sources and analyses regarding those subjects already addressed in this RFR. The rest of this document addresses the Board's more recent C&T determination for Ninilchik as to the Kenai River area covered by that determination. However, much that was stated in support of those prior RFRs also applies to the more recent determination, just as much of what is stated hereafter as to that determination also applies to those prior C&T determinations.

all on the pivotal question of what “fish stocks” are present in the area subject to the Board’s determination and whether those stocks have been customarily and traditionally harvested by Ninilchik residents).

The regulatory definition of “customary and traditional use,” is: “[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.” 36 C.F.R. §242.4; 50 C.F.R. §100.4.

The limited, sporadic fishing for some types of fish occasionally undertaken by some residents of Ninilchik within some of the Kenai National Wildlife Refuge and Chugach National Forest areas north of and including the Kenai and Russian River drainages does not fall within the regulatory definition of a generations-old, community-wide “customary and traditional use.” The evidence established that those residents reach those fishing areas, which are located many miles overland from Ninilchik, only by traveling paved highways and main arterials to those areas. The information available to the Board demonstrated that subsistence fishing had been prohibited “in all streams and lakes” of the Kenai Peninsula since 1952, shortly after the highway connecting Ninilchik to the Kenai River Area covered by the C&T determination was built.³⁰ No evidence was presented to demonstrate that subsistence use of fish from the waters situated within the Kenai National Wildlife Refuge and Chugach National Forest was ever part of a consistent, recurring pattern of use for the community of Ninilchik or that such use ever played an important role in the economy of the community, before or after 1952.³¹ Since there was insufficient or no evidence of the existence of such a “long-term, consistent pattern” of a customary and traditional subsistence harvest of those fish from those waters by the community of Ninilchik prior to the promulgation of the preclusive regulations in 1952, there could be no “interruption” of such use.

Ninilchik is not the same “community” it was 55 years ago, before that interconnecting highway was built and those regulations promulgated.³² Neither was it

³⁰ See January 2006 OSM Staff Report at p. 199.

³¹ The available evidence was that it was much more likely that Ninilchik’s subsistence activities prior to 1952 would have been primarily in marine areas close to the community because a road into the community was not built until 1951. Jan. 2006 Staff Report at 221; 11/16-17/06 Tr. at 124.

³² The available evidence established that the character of the community has changed greatly and that the population is now “dominated by new residents who have full time jobs and are interested in recreational fishing and hunting,” Jan. 2006 Staff Report at 221, and that Ninilchik residents no longer move seasonally to hunt and fish, *id.* See also 11/16-17/06 Tr. at pp. 122-134; Reed, Carolyn, *The Role of Wild Resource Use in Communities of the Central Kenai Peninsula and Kachemak Bay, Alaska* (ADF&G Technical Paper No. 106, October 1985), reporting on interviews and surveys done of

shown that subsistence use of salmon, Dolly Varden, rainbow trout, lake trout, Arctic char, grayling, and burbot from those federal enclaves covered by the Board's C&T determination, if allowed, would play an important role in the economy of the community of Ninilchik even now.³³ To the contrary, the evidence presented showed very low levels of use for fish by Ninilchik's residents of the Kenai River drainage or the other drainages north of the Kenai River, both in general and even within the more southern reaches of those federal enclaves.³⁴

For those and other reasons stated before and afterwards in this RFR and shown by the evidence (and lack thereof) presented to the Board in connection with its C&T determination proceedings in January and November 2006, the regulatory definition and criteria for a customary and traditional use determination were not applied or satisfied in this instance.

The regulations require the Board to determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence by the community and to identify the specific community's or area's use of those specific fish stocks and wildlife populations. 36 CFR §242.16(a); 50 CFR §100.16(a). Eight specific factors which must be generally exhibited are established for finding customary and traditional use:

- (1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;
- (2) A pattern of use recurring in specific seasons for many years;
- (3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics;

over 10% of Ninilchik households in 1982-83 and concluding, at p. 96, that even then the "differences between segments of Ninilchik's population contributed to the general lack of a community-wide pattern of resource use and beliefs or values associated with resource use." This report is cited in Dr. Fall's studies on Ninilchik and in a very recent federal Draft Staff Analysis relating to WP07-16.

³³ Available information indicated that fish harvests by Ninilchik's residents are now "generally concentrated close to their homes." Jan. 2006 OSM Staff Report at 221. *See also* Tr. 11/16-17/06 at pp. 122-134. Harvests from more distant areas are not cost efficient when fuel costs are considered and could not be expected to play an "important role in the economy of the community." 36 CFR §242.4; 50 CFR §100.4.

³⁴ *See, e.g.*, Jan. 2006 Staff Report at 221-22; Jan. 2006 Tr. at 212-213; 11/16-17/06 Tr. at 87; Fall et. al., Estimated Percentage of Ninilchik Households Fishing in the Kasilof River Drainage (2005), & Fall et al. Reports for the Kenai River Drainage (2004-2006).

(4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from, the community or area;

(5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate;

(6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation;

(7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and

(8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

36 CFR §242.16(b); 50 CFR §100.16(b).

The Board did not have adequate information and analysis before it to properly evaluate those eight factors, and the information provided to the Board by federal staff was not sufficient to show a recurring long-term, consistent “pattern of use” of all fish within the areas of the waters encompassed by the Board’s determination and amended regulation. Indeed, the Board did not attempt to apply those eight criteria in any level of detail on the record.

The written federal staff reports purported to apply the eight factors. However, the staff analysis was incomplete and misleading in its treatment of the level and location of the history of requisite uses by Ninilchik residents.³⁵ It was also fundamentally flawed because there was no recurring long-term, consistent “pattern of use” shown by residents of Ninilchik of each (or any) of the designated fish stock in the waters situated within the federal areas covered by the C&T determination.³⁶ There was no evidence presented by federal staff, and none was requested by the Board, that could establish such a pattern of use by Ninilchik of those areas for any of those stocks. At most, the record indicated that some fishing, of a “sport fishing” nature, had occurred involving some residents of Ninilchik within some of the widespread area of the C&T determination, of some of the

³⁵ See OSM Staff Analysis reports for January 2006 Board Meeting as to FP06-09 and for November Board Work Session as to FRFR06-02/03/08, and *compare to* ADF&G’s Comments upon those reports including former Commissioner Campbell’s Oct. 26, 2006 correspondence to the Board and Attachments 1 & 2 thereto.

³⁶ *Id.*

five species of salmon and even less of the other types of fish species designated within the C&T determination.³⁷

The vote of the Board turned, at the last moment, on two new Board assumptions:

(1) That it was unnecessary to determine that Ninilchik had customarily and traditionally fished the geographic area of the C&T determination if the Board could conclude that Ninilchik had “traditionally and customarily” fished the “same fish stock” any other area of the Kenai River, the Kasilof River, the Ninilchik River, Deep Creek, or any other part of “that entire [Cook Inlet or Kenai Peninsula] area” (11/16-17/06 Tr. pp. 167, 169), and

(2) That all of the fish within all of those “several different systems . . . could be defined as the same fish stock” (*id.*).

Obviously, for those assumptions to hold true, it was critical that there be substantial, documented evidence in the record that all of the fish within all of those river systems were in fact of the same stock. Yet, in this instance, there was absolutely no evidence presented to the Board which could rationally support either of those assumptions, or even the assumption that any particular species of fish within those “several different systems” were of the same stock. Instead, all of the evidence in the record, and the entire analysis and discussion of the proposal until the last second, related to *where* Ninilchik residents fished, *when*, *how*, *what general species* of fish (such as salmon or trout) they fished, *how much*, and *how often*.

The regulatory requirement for customary and traditional use determinations is to “identify the specific community’s or area’s use of *specific* fish *stocks* and wildlife populations.” 36 CFR §242.16(a); 50 CFR §100.16(a) (emphasis added). Thus, wherever the regulations require a “pattern of use,” the regulations are referring to a pattern of use of a specific area and of a specific stock or population by a specific community. Six of the eight factors refer to a “pattern of use.” This “pattern of use” required by factors 1 through 3 and 6 through 8 was not shown in this instance.

The first and most important factor is a “long-term consistent pattern of use, excluding interruptions beyond the control of the community or area.” The information presented to the Board did not support deciding this key factor favorably for Ninilchik as to any fish stock located within the C&T determination area, and certainly not as to all fish found in the area. The Cook Inlet Customary and Traditional Subsistence Fisheries Assessment considered by the Board instead provided:

³⁷ *Id.*

Federal public lands and waters were also relatively unimportant as fishing locations for interviewed Ninilchik residents in 2002/2003 . . . the Ninilchik River and Deep Creek, both under state management, were key fishing locations for Ninilchik households for chinook salmon, coho salmon, and Dolly Varden. Most Ninilchik households . . . that fished for sockeye salmon used the *lower* Kenai River . . . with the Kasilof River and Ninilchik River also important for sockeyes

Fall et. al. at 51. The oral federal staff report reported that Ninilchik harvests of Chinook, coho, and sockeye salmon and Dolly Varden were taken from waters and specific fish stocks located outside the Kenai National Wildlife Refuge and Chugach Forest lands which are the subject of the Board's C&T determination. Jan. 2006 Tr. at 213. Very little use was shown for Ninilchik of any species of fish other than salmon and Dolly Varden,³⁸ and none of the federal, ADF&G, or NTC staff reports or household or tribal use surveys addressed during the Board's November session identified the specific fish stocks commonly taken by Ninilchik residents nearby their community with the fish stocks in the distant, farflung geographic areas within the "Kenai River Area" federal lands associated with the Board's new C&T determination.

The use data summarized in the staff reports and in the surveys applied to all use of fish in recent years by Ninilchik, as a general category, and the data relating to areas used were applied to the entire Kenai Peninsula District, not just the federal areas of the C&T determination. The combined use information presented to the Board in connection with its January and November 2006 proceedings demonstrated that all but a very small part of the fishing by the Ninilchik community households has occurred on state lands far downstream from the boundaries of the Kenai National Wildlife Refuge and Chugach National Forest. Even using that larger area, harvest rates by Ninilchik residents were shown to be extremely low.³⁹

Isolated instances of historical use by some individual residents of Ninilchik and their families were presented, but, as was pointed out in the State's comments, this limited information did not reflect a long-term, recurring and consistent pattern of use by the Ninilchik community or area of the same fish stocks as are located within the federal

³⁸ See, e.g., OSM Staff Report for January 2006 proceedings at p. 206 (Table 4)(only 5 percent of Ninilchik households used trout, and only 4.0 used char/lake trout; per capita annual consumption even of Dolly Varden was only .62 pounds, for trout it was .22 pounds, and for char/lake trout it was .03 pounds); see also January 2006 Staff Report at 211 (Table 8)(showing only 12 percent of Ninilchik households harvested Dolly Varden and 15 percent harvested char).

³⁹ *Id.* at 219.

lands of the upper Kenai River C&T determination area either.⁴⁰ Any indications of longterm patterns of historical use were limited to the immediate area surrounding the old Ninilchik community. Occasional recreational fishing in the upper Kenai River area developed following construction of the Sterling and Seward highway systems in 1951, and was not shown to be consistent with or linked to usages by the current community, the community which existed 50 years ago, or even the Ninilchik community which existed at the time of the passage of ANILCA in 1980.⁴¹

Uses were further changed by homesteading in the 1930s and 1940s and by the establishment of the Kenai Moose Range in 1941. In 1952, prohibitions were placed on the use of gill nets in most fresh waters within the region which further emphasized reliance on marine fisheries, although some fresh water subsistence activities reportedly continued through snagging of salmon until that method was restricted in 1969 and made illegal in 1973.⁴² Sport fishing continued in fresh water, but subsistence and personal use fishing was a predominantly marine activity by the early 1970s, before the passage of ANILCA.⁴³ Although some residents of Ninilchik are of Alaska Native descent, there is no longer a direct linkage between historical use by Alaska Natives who once inhabited the area of Ninilchik and more contemporary use of fish by the community of Ninilchik.⁴⁴

The second factor is a “pattern of use recurring in specific seasons for many years.” As earlier discussed herein, such a pattern was not shown for Ninilchik within the federal public lands within the Kenai River Area which are the subject of the Board’s C&T determination.⁴⁵

The third factor is a “pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics.” Such a pattern was not shown for the community of Ninilchik in

⁴⁰ See, e.g., October 26, 2006 Letter from Commissioner Campbell to Chairman Fleagle, at 4 and two attachments thereto; 11/16-17/06 Tr. pp. 122-134.

⁴¹ *Id.*

⁴² OSM Staff Report for Board’s January 2006 Proceedings, at 204; Fall et. al. 2004 at 19-20, 22-23.

⁴³ ANILCA was adopted in 1980 to allow rural communities engaged in a subsistence way of life to continue to do so, not to create new subsistence opportunities or revive past subsistence practices. Therefore, even if a pattern of subsistence use before 1952 had been shown (which it was not), the pre-ANILCA restrictions should not be considered an interruption of use under the first factor.

⁴⁴ Board January 2006 Proceedings, at Tr. p. 205.

⁴⁵ See, e.g., Commissioner Campbell’s 10/26/06 Correspondence to the Board, including specific comments in Attachments 1 & 2 thereto; 11/16-17/06 Board Proceedings Tr. pp. 94-96, 121-134.

the area of the C&T determination, or elsewhere. No information was shown to indicate how harvests in an area roughly 100 miles from Ninilchik could be characterized as efficiency and economy of effort, when fish species available within the Kenai River Area of the C&T determination are also available in areas more accessible to Ninilchik, particularly in marine waters and state waters in the Ninilchik River, Deep Creek, and lower Kasilof drainages. The staff reports, as well as public testimony provided to the Board, indicated that since at least the early 1950s, any harvest of fish within federal lands has been consistent with inefficient rod and reel recreational fishing, not with the efficiency and economy of effort associated with subsistence harvests. Further, the available harvest data showed very low harvest levels for Ninilchik for fish species other than salmon even when all harvests were considered, not just harvests within federal lands within the Kenai River Area.⁴⁶ These low harvest levels are not consistent with a “pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost.”

The sixth factor is a “pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation.” Although knowledge of fishing and hunting skills may have been passed down from generation to generation among some resident of Ninilchik, the record does not show a community level pattern of any such tradition, or one involving use of the distant federal lands within the upper Kenai River Area which are the subject of the Board’s C&T determination. Use by some members of the community in some areas does not show a pattern of use by the community as a whole, or in other areas.

The seventh factor is a “pattern of use in which the harvest is shared or distributed within a definable community of persons.” The available information indicated that for species found in fresh water other than salmon, there was very little sharing in Ninilchik. The available record indicated that the highest reported household rate of giving for nonsalmon freshwater fish was 5 percent of households for Dolly Varden, and that the highest household rate of receiving for nonsalmon freshwater fish was 4 percent for trout.⁴⁷ Although salmon were shared at a higher rate,⁴⁸ there was no evidence of an established, recurring pattern of use in which salmon harvested from the federal public lands were shared.

⁴⁶ Salmon are more efficiently available from waters within state lands, and the record indicated that with the possible exception of coho, salmon were harvested primarily in marine and lower river fisheries as early as the late 1800s. Even coho have not been subject to efficient, traditional subsistence harvest methods in fresh water since 1952.

⁴⁷ OSM Staff Report for Board’s January 2006 Proceedings at 211.

⁴⁸ Overall, grouping all salmon species, 46 percent of households gave salmon and 58 percent received salmon. *Id.*

The eighth factor is a “pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.” Again, there was no documentation of a long-term community-wide, consistent and recurring pattern of use by Ninilchik relating to reliance on fish from the federal public lands in the area of the C&T determination. Residents of Ninilchik rely upon a relatively low number of wild foods,⁴⁹ most of the fish used by Ninilchik residents are harvested from state waters,⁵⁰ and uses and attempted uses of nonsalmon freshwater fish by Ninilchik residents are extremely low, indicating that they do not provide substantial cultural, economic, social, and nutritional elements to the community, whereas the Board’s C&T determination is for “*all* fish”.

As shown above, the six factors requiring a “pattern of use” do not support the customary and traditional use determination upon which reconsideration is sought. The information presented to the Board (and that which the proponents of the determination failed to present) demonstrates that the community of Ninilchik does not “generally exhibit” the “pattern of use” factors for use of the specific fish stocks located within the federal areas of the vast “Kenai River Area” that is the subject of the Board’s C&T determination for Ninilchik for that area. Since there was not substantial evidence presented satisfying those factors upon which the Board’s determination can be supported, the determination is legally unsupportable, arbitrary, capricious, and unreasonable.

Even the two factors that do not refer to a “pattern of use” are still tied to specific stocks and areas and uses of stocks in those areas under 36 CFR §242.16(a) and 50 CFR §100.16(a). Those factors also do not support a customary and traditional use determination on the federal lands within the afore-mentioned Kenai River Area.

Factor four contains an explicit geographic reference:

A consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area.

36 CFR §242.16(b)(4); 50 CFR §100.16(b)(4). All of the salmon and most of the freshwater fish available in the Kenai River Area are available in areas much closer to Ninilchik. The methods and means used have not been consistent, with frequent changes over the years; little to no evidence of consistent use of the current rod and reel methods by Ninilchik residents within federal lands in the Kenai River Area drainages was

⁴⁹ *Id.* at 226 (household average of 8.6 compared to 12.9 in Seldovia, 16.5 in Port Graham, and 21.5 in Nanwalek).

⁵⁰ *See* Fall et. al. at 51 (2004).

presented. Prior to completion of the Sterling Highway in 1951, access from Ninilchik to the distant Kenai River Area waters which are the subject of the Board's new C&T determination would have been much more time consuming and less efficient than access to areas closer to Ninilchik. It would have been, in a word, impractical. Thus, the record does not show the community of Ninilchik "generally exemplifies" factor four for a preferred subsistence use of federal lands within the Kenai River Area.

Factor five deals only with handling, but under 36 CFR §242.16(a) and 50 CFR §100.16(a)), this use must be tied to the fish stock or wildlife population for which a C&T finding is made:

A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate.

36 CFR §242.16(b)(5); 50 CFR §100.16(b)(5). From the amounts harvested, as well as from much of the public testimony, it appears that what fishing might have occurred within federal lands constituting the Kenai River Area of the C&T determination involved immediate consumption rather than preservation.⁵¹ The record does not support a finding that the community of Ninilchik "generally exhibits" handling, preparing, preserving, and storing fish from the Kenai River Area waters which are the subject of the Board's new C&T determination for that area.

The eight regulatory factors for making a customary and traditional use determination have not been properly applied and could not reasonably be applied, based on the information presented to the Board, to show the necessary recurring, long-term consistent customary and traditional use by residents of Ninilchik of the specific fish stocks within the Kenai River Area that is the subject of the Board's C&T determination upon which Board reconsideration is requested. Any taking of fish stocks from outside the area in which historical use patterns have been shown does not fall within the regulatory definition of "customary and traditional use" because there is no "long-established, consistent pattern of use" of the stock or area. *See* 36 CFR §242.4; 50 CFR §100.4.

As former Commissioner Campbell pointed out to the Board during its January 2006 proceedings, the standard isn't whether a species has "been eaten at one time or another for subsistence."⁵² The Board is instead bound by existing federal regulations regarding customary and traditional use determinations. It is also bound by the facts, not

⁵¹ *See e.g.*, Board's Jan. 2006 Proceedings at Tr. p. 274 (Stokes: "basically we ate it that night"); 275 (Steik: "We mostly catch trout and grill them or fry them on a stick.").

⁵² Transcript of Board's Jan. 2006 Proceedings at 295.

unsupported assumptions. Because a demonstrated customary and traditional use by Ninilchik within the same area and of the same fish stocks as exist within the Kenai River Area to which the Board granted Ninilchik a C&T determination is required and was not shown, reconsideration of that determination by the Board is appropriate and necessary.

B. The regulations are inconsistent with ANILCA because they authorize a subsistence priority for fishing that is not customary or traditional.

Reconsideration is also required because, in adopting the customary and traditional use determination for Ninilchik as to the Kenai River Area, the Board exceeded ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so and did not adhere to provisions of Section 803 of ANILCA, which authorizes only "subsistence uses" which are defined as "customary and traditional uses."

Any subsistence fishing, especially any by residents of Ninilchik, that may have occurred within the Kenai River Area drainages affected by the Board's recent C&T determination ended long before the enactment of ANILCA in 1980. For that reason and other reasons stated in this RFR, any subsistence fishery within that area created by the Board's new C&T determination represents a new opportunity and does not serve ANILCA's purpose of allowing rural residents engaged in a subsistence way of life to continue to do so. The information presented to the Board was that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Furthermore, as the Board was repeatedly advised (*see, e.g.*, 11/16-17/06 Tr. pp. 126, 121 & ADF&G 10/26/06 correspondence cited there), subsistence use is not among Congress' expressed purposes for the Kenai National Wildlife Refuge in ANILCA. Section 303 of ANILCA provides otherwise. Since any subsistence fishing that may have taken place within the area of the Board's new C&T determination ended over two decades prior to the enactment of ANILCA, a subsistence fishery in that area does not further the purpose of continued subsistence use under ANILCA.

As already discussed, neither did the Board have sufficient evidence before it to support the conclusion that whatever fishing had occurred within the Kenai River Area of that area's specific fish stocks was a consistent, recurring, long-term "customary and traditional" use by the residents of Ninilchik.

Despite those shortcomings, the Board made a C&T determination for the community of Ninilchik for "all fish" within that Kenai River Area, including all five types of salmon, Dolly Varden, lake trout, rainbow trout, steelhead, Arctic char, grayling, and burbot. In making that determination as to "all fish," the Board ignored or improperly discounted the following information (among other things): That "none of the communities [including Ninilchik] show **any** use of burbot" (ISC Report for Board's Jan. 2006 Proceedings at 192); that steelhead populations "are thought to be very small"

with no harvest currently allowed (*id.*); that only 2-3% of Ninilchik households, at most, identified taking trout or any other species of fish other than salmon from that area (OSM Jan. 2006 Board Meetings Analysis at 222 & Fall, et al.); that there was no evidence presented that the trout and other resident species of that broad upper “Kenai River Area” defined by the Board are of the same stock as the other fish much more commonly fished by Ninilchik residents much closer to home, such as at the Ninilchik River and Deep Creek; and that there was no evidence presented to permit the Board to conclude that the Kenai River Area salmon stocks are the same specific stocks as the salmon also much more commonly fished by Ninilchik residents from those other waters located much closer to that community.

“[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.” *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977). ANILCA authorizes only subsistence uses that are “customary and traditional.” Section 803 of ANILCA defines “subsistence uses” as follows:

As used in this act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, then, any fishing allowed must be “customary and traditional.” This statute should be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state’s authority over management of fish and game within its borders.⁵³

Federal courts have already acknowledged that ANILCA only authorizes “customary and traditional” subsistence uses on federal public lands in Alaska. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial

⁵³ “[I]f Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA’s subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is “peculiarly within [a state’s] police powers.” *Baldwin v. Fish and Game Comm’n of Montana*, 436 U.S. 371, 391 (1978).

interpretation, only uses that are actually customary and traditional upon those lands and of the same specific fish stocks within those lands are authorized by ANILCA.

There is nothing substantial in the record of the Board to support the determination that the community of Ninilchik has “customarily and traditionally” fished “all fish” stocks found within the “Kenai River Area” of the Kenai National Wildlife Refuge and Chugach National Forest. By making an unsupported customary and traditional use determination, the Board provides Ninilchik with a subsistence priority for fishing in faraway waters that does not fall within ANILCA’s definition of “subsistence uses.” Because the Board’s actions providing a customary and traditional use determination for residents of Ninilchik for all fish within federal lands within the “Kenai River Area” designated by the Board’s action is inconsistent with ANILCA, reconsideration of that action is required.

C. The regulations are inconsistent with ANILCA because they are likely to cause unnecessary restrictions of nonsubsistence use.

Reconsideration is also required because, in adopting the customary and traditional use determination, the Board failed to recognize its duty to balance the competing purposes of ANILCA⁵⁴ and to prevent unnecessary restrictions on non-subsistence uses. Section 815 of ANILCA provides:

Nothing in this subchapter shall be construed as:

...

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; . . .

16 U.S.C.A. § 3125(3) (2000).

Although the unsupported customary and traditional use determinations in this case do not yet impose direct immediate restrictions on taking of fish for other uses within the areas of the determinations, they can be expected to lead to an implementation and liberalization of take provisions otherwise prohibited and thus cause unnecessary restrictions for other users of these very popular, fully allocated fisheries already subject to harvest pressures. As former Commissioner Campbell stated to the Board:

⁵⁴ See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000).

Once the C&T determination is in place, I believe you have started down the legal road where it is very hard not to then react favorably to subsequent proposals that you will receive regarding nets, regarding seasons, regarding bag limits, methods and means, all of these things.⁵⁵

As previously noted, under section 303 of ANILCA, the purposes for the Kenai National Wildlife Refuge, unlike other refuges, do not include “continued subsistence use” but do explicitly include “opportunities for fish and wildlife-oriented recreation.” The waters of the upper Kenai River, Russian River and other river drainages and lakes situated within the exterior boundaries of the Chugach National Forest have also long been heavily, customarily, and traditionally dedicated to recreational opportunities, including the catching and taking of fish. Those waters are located roughly 100 highway miles from Ninilchik, and, as was shown, have been fished very little by the residents of Ninilchik. Nevertheless, the Board failed to adequately consider and balance the recreational purposes and longstanding practices of the Kenai National Wildlife Refuge and Chugach National Forest in its determinations, and to avoid actions that would cause unnecessary restrictions on recreational uses and opportunities within those dedicated lands. Any new subsistence harvest in the fully allocated and restricted fisheries of the Kenai and Russian Rivers will likely require new restrictions on non-subsistence fishers. Indeed, new consumptive subsistence harvests of rainbow trout, steelhead, and other resident species stocks for which the residents of Ninilchik are now eligible under the Board’s new C&T determinations could result in complete closures of recreational fisheries in these recreation-oriented areas in order to protect vulnerable, slow-growing stocks.

The cumulative impacts of such decisions can be expected to require new restrictions upon state fisheries in order to assure compliance with the sustained yield mandate of the Alaska Constitution. The Board’s regulatory action, if not corrected, will lead to unnecessary restrictions on non-subsistence uses in violation of section 815 of ANILCA and without balancing ANILCA’s purposes for the Kenai National Wildlife Refuge and the established, longstanding purposes of the Chugach National Forest lands.

D. The Board’s interpretation of existing data was in error because it was not based on full analysis of available information.

In addition, reconsideration is necessary because the Board did not adequately and properly consider all information presented to it, and, in the case of fish stocks, failed to require information necessary to its determinations. These failures led to incorrect, unsupportable determinations in fact and law. As has been demonstrated, the Board failed to give adequate consideration to longstanding legal and traditional purposes and priorities for the Kenai National Wildlife Refuge and Chugach National Forest

⁵⁵ January 2006 Board Proceedings at Tr. p. 289.

emphasizing recreational opportunities and practices. As has also been demonstrated, the Board failed to adequately and properly consider and evaluate the entire body of information (and lack of information) presented to it which showed that the community of Ninilchik only infrequently, sporadically, and minimally used the area of the C&T determinations to harvest fish, and then only some fish -- instead of showing a recurring, long-term consistent pattern of use by Ninilchik of all of those resources as is required by the Board's determination and by law.

Notably, the Board did not require *any* evidence, as to any species, to support its incorrect assumption that fish stocks harvested by Ninilchik households in waters located outside of and far away from the C&T areas were the same specific fish stocks as those fish located within the C&T areas. As a result, the Board made an overly broad, incorrect determination, creating a subsistence preference for Ninilchik of all salmon, Dolly Varden, rainbow trout, lake trout, steelhead, Arctic char, grayling, and burbot wherever found within the Kenai River National Refuge and Chugach National Forest, although no customary and traditional harvest by that community of the fish stocks within those areas had been shown.

Because the Board's determinations were made without sufficient and proper consideration of all the information presented to the Board, because the Board completely failed to require other information necessary to support its determination as to Ninilchik and the Kenai River Area, and because these defects in analysis caused the Board to make incorrect determinations unsupported by fact and law, those determinations are unreasonable, arbitrary and capricious, and should be reconsidered.

E. The regulation process was arbitrary, capricious and improperly prohibitive.

On the morning of November 17, 2006, shortly after Board deliberations on the motion for a C&T determination for Ninilchik as to the Kenai River Area had begun and the State liaison representative had begun to speak, the Board Chair, at the request of a Board member and upon incorrect advice of the Solicitor's Office, cut off and precluded the State liaison, Sarah Gilbertson, from being heard on the motion.⁵⁶ The Board Chair based this ruling on the erroneous, unreasonable and arbitrary advice of the Solicitor's office in direct violation of directives of the Secretary of the Interior and the Board's own procedures established in 2004.⁵⁷ The ruling effectively precluded participation by the

⁵⁶ 11/16-17/06 Tr. at 161-163.

⁵⁷ See Letters from Secretary Norton to State of Alaska Governor Murkowski and Board Chairman Demientoff dated February 24, 2004 and attached hereto as Attachment 3; Transcript of December 12 - 13, 2006 Board Meetings (wherein the Board Chair, reading from those Secretarial directives, acknowledged the erroneous ruling on

State of Alaska in the Board's deliberative process and caused, or at least contributed to, the Board's erroneous and unsupported determinations.

Because the Board made a mistake of law in excluding the State of Alaska from participation in deliberations upon the motion, and because this mistake of law resulted in substantive harm to the State of Alaska and resulted in or contributed to an arbitrary and capricious decision by the Board contrary to established substantive procedures governing the Board, reconsideration, during which effective participation by the State of Alaska will be allowed, is appropriate and necessary.

F. The regulations are arbitrary and capricious.

In order to be valid, regulations must be reasonable and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (1971).

The Board regulations making a customary and traditional use determination for Ninilchik for all fish within the Kenai River Area as defined by the Board is arbitrary and capricious for several reasons. As already shown, the Board's actions were inconsistent with its own regulations and with the statutory definition of "subsistence use" because the record did not contain substantial evidence to support the Board decision. The Board also unreasonably denied the State the opportunity to participate meaningfully and completely in deliberations upon the proposal. The Board failed to adequately and properly consider and balance the likely cumulative impacts from its overly broad C&T determination on other uses and users. The Board failed to respond to concerns raised by the State and Secretary that the Board needed to develop written procedures and policies to govern customary and traditional use determinations, a failure which contributed to the Board's actions violating its own regulations and federal statutes.

Prior to the Board's action, the State repeatedly raised concerns regarding inconsistency and lack of standards used by the Board for making customary and traditional use determinations. The Secretary responded to these concerns and, on October 27, 2005, urged the Board to develop written procedures or policies for customary and traditional use determinations and to review "whether analytic thresholds and benchmarks for certain criteria are needed and appropriate for inclusion in the decision process." The State requested that the Board delay further customary and traditional use determinations until after development of these policies and procedures.⁵⁸ In the context of the previous proposal on which NTC's request for reconsideration of a

November 17 preventing the State from being heard on the motion establishing the C&T determination).

⁵⁸ See, e.g., January 2006 Tr. at 287; 11/16-17/06 Tr. at 121, 126-127, 185; Campbell Correspondence to Board dated October 26, 2006, at pp. 1-2.

C&T determination for Ninilchik was based, ADF&G's former Commissioner pointed out that the standard is not whether a resource has been eaten for subsistence, and, if that were the standard, the Board's review process would be unnecessary:

I believe that there's probably nowhere in Alaska you can find that any species that exists hasn't been eaten at one time or another for subsistence. But if that's the standard, I can save you guys a lot of time. You don't need to do this you know. It's just all customary and traditional use. The fact that you're going through this implies that that is something – it must be narrower than the fact that, you know, I don't think there's a thing in Alaska that somebody hasn't eaten at some point when they were hungry enough and in need and they happened to be there.

So, while I have my standard of what long-term consistent pattern of use would be, what I think is most as [sic] important that this Board have its standard that it can apply consistently case by case and that's why I'm simply suggesting that you delay until you work that out.

January 2006 Tr. at 295.

The Board proceeded to make this C&T determination for Ninilchik (and previous customary and traditional use determinations related to the Kenai Peninsula District) without first developing any written policies or procedures, and without defining what would constitute a "pattern of use" by a community. As a result, the Board made a C&T determination despite a lack of evidence of a community level long-term, recurring and consistent "pattern of use" by Ninilchik for the fish included in the C&T determination area.

The Board's violations of its regulations regarding customary and traditional use determinations and its provision of a C&T determination in this instance for activities that do not qualify as "subsistence uses" under ANILCA are discussed more fully above. The object of the final rule is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that the fishing allowed is customary or traditional. The term "customary and traditional use" is defined by regulation to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 CFR §242.4; 50 CFR §100.4. Customary and traditional use is determined by applying eight regulatory factors which a community must "generally exhibit." While the State agrees that it is not necessary for a community to demonstrate all eight factors,

as ADF&G's former Commissioner indicated to the Board during discussion of the prior proposal concerning Ninilchik in January 2006, some of the factors must be met and a recurring, long-term consistent pattern of use must be shown:

As was pointed out earlier you don't have to meet all eight factors, but it is important that you . . . meet some of them. As Ms. Armstrong correctly said I believe, if you don't meet the first, long-term consistent pattern of use, you might as well not bother with the rest.

January 2006 Tr. at 286.

In this instance, the Board proceeded to make a customary and traditional use determination for Ninilchik for the Kenai River Area at issue without developing a record showing a community-wide recurring "long-term consistent pattern of use" for that community within that area, without showing that such "use plays an important role in the economy of the community", and without even establishing a history of use by Ninilchik of some species and the specific stocks of fish covered by the Board's determination. Thus, the Board's action in providing a customary and traditional use determination for Ninilchik for all fish stocks within the waters within the Kenai River Area over which the federal government claims jurisdiction was arbitrary and capricious, because it was inconsistent with both the regulatory definition of "customary and traditional use" and with the regulatory requirements for finding "customary and traditional use."

In summary, the Board's unreasonable failure to adopt and follow a written policy for customary and traditional use determinations, its failure to follow its own regulations defining customary and traditional use and regulations listing factors that must be "generally exhibited" before a positive customary and traditional use determination is made, its unreasonable exclusion of the State from participation in the deliberations resulting in the C&T determination, and the Board's unreasonable failure to consider the cumulative impact of its overly broad C&T determinations, renders the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to adopt these invalid regulations providing a customary and traditional use determination for Ninilchik as to all fish in the Kenai River Area covered by the Board's C&T determination.

G. The Board has no jurisdiction to make the customary and traditional use determinations upon which reconsideration is requested.

As previously stated, the State of Alaska has legally challenged the Board's claim to jurisdiction to make the C&T determinations on which reconsideration is sought by this Request for Reconsideration and by additional Requests for Reconsideration being filed by the State this month and previously, because the federal government has not

legally and properly established water rights in the waters covered by those determinations, as is set out in the pending litigation entitled *Katie John, Gerald Nicolia, et al., Plaintiffs, v. The United States of America, et al., Defendants*, in the United States District Court for the District of Alaska, Case No. A05-0006-CV (HRH) (Consolidated). Accordingly, it is the State's position, which it reserves and does not waive, that those determinations by the Board are illegal, void, and of no effect on that basis. The State's position in that regard and reasons supporting it are set forth in its filings in that pending litigation and are incorporated herein by reference.

IV. Conclusion.

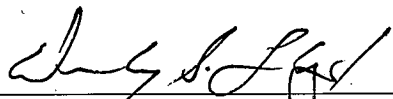
The Federal Subsistence Board's determination and regulation finding that the residents of Ninilchik have customarily and traditionally harvested all fish stocks within the previously-described, widespread "Kenai River Area" for subsistence use, and are therefore entitled to a priority harvest right to those resources under federal law, is inconsistent with ANILCA and with Federal subsistence regulations. Those actions by the Board ignore regulatory and statutory definitions and criteria. They authorize fishing privileges that are not customary and traditional and that will lead to unnecessary restrictions on other users. They ignore information that was available to the Board, fail to consider other appropriate and necessary information, and unreasonably, arbitrarily and capriciously establish preferential uses on the basis of speculation rather than real evidence or information. They provide a subsistence preference for Ninilchik's residents without it having been adequately shown that Ninilchik's residents have customarily and traditionally harvested the relevant stocks for such purposes in the areas affected, and after the available data instead showed only sporadic, occasional use by some individuals, rather than the long-term, consistent recurring community pattern of use required by law. Those actions were taken only after the Board unreasonably precluded the State of Alaska from the Board's deliberations wherein they were reached, and were adopted by the Board without first developing written policies and procedures as urged by the Secretary of the Interior in order to ensure Board compliance with regulatory requirements. The Board's actions upon which reconsideration is hereby sought are unsubstantiated, arbitrary and capricious. For these reasons and others herein stated, the State of Alaska respectfully requests that the Board reconsider its final rules finding customary and traditional use of fish stocks for Ninilchik in the waters of the Kenai River Area over which the Board incorrectly claims jurisdiction. The State also requests that

the Board definitively decide the State's previously submitted, pending requests for reconsideration as to the Board's prior determinations granting Ninilchik a customary and traditional use priority determination as to the Kasilof River drainage waters and Hope and Cooper Landing customary and traditional use determinations as to the Kenai River Area waters.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: _____

16 Jan 07



Denby S. Lloyd, Acting Commissioner